

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>ANGIE M. ALLISON</b>	)	
Claimant	)	
VS.	)	
	)	
<b>HOLIDAY RESORT OF SALINA</b>	)	Docket No. 1,013,100
Respondent	)	
AND	)	
	)	
<b>KANSAS HEALTHCARE ASSOCIATION</b>	)	
<b>WORKERS COMPENSATION INSURANCE</b>	)	
<b>TRUST</b>	)	
Insurance Carrier	)	

**ORDER**

Respondent appeals the August 16, 2004 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded benefits, ultimately resulting in a 38.25 percent permanent partial work disability for injuries suffered on April 24, 2001. The Appeals Board (Board) heard oral argument on February 1, 2005.

**APPEARANCES**

Claimant appeared by her attorney, Norman R. Kelly of Salina, Kansas. Respondent and its insurance carrier appeared by their attorney, Kip A. Kubin of Kansas City, Missouri.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge. Additionally, at oral argument, the parties stipulated that claimant suffered a 10 percent impairment of function as a result her injuries. That finding is, therefore, affirmed by the Board. Additionally, the parties acknowledged that the finding by the ALJ that claimant has suffered a task loss of 25.5 percent pursuant to K.S.A. 44-510e was also not in dispute, and that finding is also affirmed by the Board.

**ISSUES**

- (1) What is the nature and extent of claimant's disability? More particularly, under K.S.A. 44-510e, what, if any, wage loss has claimant suffered as a result of the injuries occurring on April 24, 2001?
- (2) Respondent disputes the method of computing the award utilized by the ALJ, arguing the ALJ's computation method provided a windfall for claimant.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed. The Award sets out findings of fact and conclusions of law in some detail and those will not be repeated herein. The Board adopts those findings and conclusions as its own.

Claimant was employed by respondent as a CNA (certified nursing assistant) when, on April 24, 2001, while transferring a 225-pound patient from a recliner to a wheelchair, she suffered an injury to her low back when the patient's knees gave out. Claimant experienced pain at that time, but the pain worsened overnight until, by the next day, claimant was in severe pain. She was referred initially to Dr. Gary Williams, who then referred her to board certified neurosurgeon Ali B. Manguoglu, M.D., for treatment. Dr. Williams had earlier ordered a lumbar MRI, which Dr. Manguoglu utilized to diagnose a herniated disc at L5-S1. After a course of conservative treatment (including lumbar steroid injections and physical therapy) proved unsuccessful, Dr. Manguoglu ordered a followup MRI, which indicated that the herniation was pressing on the nerves in her back. He then recommended a lumbar microdiscectomy, which was performed on June 4, 2002.

Claimant underwent an FCE on September 30, 2002. This was the second FCE that had been prescribed, as Dr. Manguoglu had previously ordered one in October of 2001. After reviewing the September 30, 2002 FCE, Dr. Manguoglu determined that claimant could lift and carry a maximum of 35 pounds on an occasional basis and instructed her to avoid repetitive forward bending and twisting of her back.

Claimant was examined by Paul S. Stein, M.D., a board certified neurological surgeon, at respondent's request on January 27, 2003. Dr. Stein diagnosed claimant with lumbar disc disease, post discectomy at L5-S1, with residual discogenic back pain. As noted above, the ALJ made determinations regarding both claimant's functional impairment and loss of tasks pursuant to K.S.A. 44-510e, and those numbers are not in dispute.

Therefore, the findings by Drs. Manguoglu and Stein relating to those issues will not be further discussed herein.

In determining claimant's permanent partial general disability, K.S.A. 44-510e sets forth the criteria which must be followed. K.S.A. 44-510e defines permanent partial general disability as,

. . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The ALJ determined that claimant suffered a series of wage losses based upon claimant's post-accident income. The ALJ acknowledged that claimant was returned to work by Dr. Manguoglu beginning October 14, 2002. Claimant testified that after numerous attempts to obtain employment during this period of time, she was successful on approximately December 1, 2002, in obtaining part-time employment, working as a CNA, assisting a paraplegic by the name of Jerry Farrar. Mr. Farrar, a 25-year-old who is paralyzed and bedridden, requires assistance with meals and cleanup and other general activities. However, as claimant does not do any lifting in this job, she is physically capable of performing the work. This job only provides claimant 20 to 25 hours of work a week at \$8 per hour. Claimant testified that even while she is caring for Mr. Farrar, she continues to look for other employment.

The ALJ averaged the stipulated task loss of 25.5 percent with a 100 percent wage loss from the period of October 14, 2002, to December 1, 2002, finding a permanent partial general disability of 62.75 percent. As of December 1, 2002, when claimant's wages began with Mr. Farrar, the ALJ, computing claimant's actual wages at 22.5 hours times \$8 per hour, imputed a \$180 wage, finding claimant's wage loss to have been reduced to 51 percent which, when averaged with the task loss of 25.5 percent, resulted in a permanent partial general disability of 38.25 percent. The method of computing the wage loss determined by the ALJ is the same method utilized by the Board.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup>

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<sup>1</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

In computing what, if any, wage loss claimant has suffered as a result of her April 24, 2001 injury, the Board must consider the policies set forth in *Foulk*<sup>2</sup> and *Copeland*.<sup>3</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above quoted statute) by refusing an accommodated job that paid a comparable wage. As respondent was unable in this instance to meet the restrictions placed upon claimant by her treating physician, the Board finds that the policies of *Foulk* do not apply. However, in *Copeland*, the Kansas Court of Appeals held, for the purposes of the wage-loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages, rather than the actual earnings, when the worker fails to make a good faith effort to find appropriate employment after recovering from the work-related accident.

If a finding is made that a good faith effort has not been made, the factfinder [*sic*] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .<sup>4</sup>

In this instance, the ALJ determined, and the Board agrees, that claimant put forth a good faith effort to find other employment after her release. Immediately upon being released to return to work by Dr. Manguoglu, claimant began a job search, which resulted in her obtaining employment within her abilities within two months of her release from treatment.

The Board notes that claimant's job search resulted in only part-time employment, with claimant's continued care for Mr. Farrar. However, claimant testified that she continues to seek employment, even while caring for Mr. Farrar.

The Board finds claimant's job search constitutes a good faith effort on her part and, pursuant to K.S.A. 44-510e and *Copeland*, will use claimant's actual wages, rather than imputing a wage as requested by respondent. While the Board acknowledges claimant is not limited in her ability to perform up to 40 hours a week of work at this time, the Board also acknowledges that claimant's efforts have been more than adequate in this regard.

K.S.A. 44-510e, as interpreted by *Copeland*, mandates the determination of an appropriate post-injury wage which will be imputed if it is found that a good faith effort has

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<sup>2</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>3</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>4</sup> *Id.* at 320.

not been made to obtain employment. In this instance, both the ALJ and the Board determined claimant's efforts constituted a good faith effort. The Board, therefore, does not have to determine an appropriate post-injury wage earning ability, but will, instead, use claimant's actual wages from the job she is currently working. Should claimant be successful in obtaining either better-paying work or work involving more hours per week, then respondent's opportunity to review and modify the award under K.S.A. 44-528 will be available.

The Board affirms the ALJ's determination that claimant has a 62.75 percent permanent partial work disability from October 14, 2002, to December 1, 2002, followed thereafter by a 38.25 percent permanent partial work disability beginning December 1, 2002.

Respondent argues that the method of computing the award utilized by the ALJ was improper and resulted in a windfall to claimant. Respondent's brief contains its suggested method of computing the award.<sup>5</sup> The Board has been presented with this proposed method of computing awards in the past and has rejected this proposed method of computing awards.

The Board's method of computing awards has been discussed in detail in *Ullum*.<sup>6</sup> The Board concluded, in *Ullum*, that its current method of calculating awards is the most equitable, as it allows for modifications of functional and work disability percentages while, at the same time, providing employers and insurance carriers credit for benefits paid under previous functional or work disability awards. The Board's method of computing benefits was considered by the Kansas Court of Appeals in *Bohanan*,<sup>7</sup> and found to be a reasonable method of calculating awards. The Board's method is intended to avoid erratic and sometimes inequitable results. The Board, therefore, finds that the method of computing the award, as utilized by the ALJ, is appropriate and the Award of the ALJ should, therefore, be affirmed.

### **AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated August 16, 2004, should be, and is hereby, affirmed in all regards.

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<sup>5</sup> Respondent's Brief at 5-7 (filed Oct. 4, 2004).

<sup>6</sup> *Ullum v. Sedan Limestone Co., Inc.*, No. 195,076, 1997 WL 557529 (Kan. WCAB Aug. 14, 1997).

<sup>7</sup> *Bohanan v. U.S.D.* 260, 24 Kan. App. 2d 362, 947 P.2d 440 (1997).

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of February, 2005.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Norman R. Kelly, Attorney for Claimant  
Kip A. Kubin, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director